C.A.C. No. 02878

NOVA SCOTIA COURT OF APPEAL
Cite as: Marwieh v. Brown, 1993 NSCA 30

Chipman, Freeman and Pugsley, JJ.A.

BETWEEN:

GEORGE MARWIEH	)	Cathy L. Dalziel
	)	for the Appellant
-and_	)	
KENNETH T. BROWN	)	
and	)	
PATRICIA K. BROWN	)	J. David Connolly
	)	for the Respondents
	)	Appeal Heard:
	)	November 10, 1993
	)	Judgment Delivered:
	)	November 10, 1993

THE COURT: The appeal is dismissed with costs as per oral reasons for judgment of Chipman, J.A.; Freeman and Pugsley, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by:

CHIPMAN, J.A.

This is an application for leave to appeal and, if granted, an appeal from a decision of the Supreme Court in Chambers allowing the application of the respondents for an order disallowing the defence of a limitation raised by the appellant.

This proceeding arose of out a motor vehicle collision which occurred in Alberta on January 12, 1990. The respondents, residents of Nova Scotia, were injured as a result of a motor vehicle collision in which the vehicle of the appellant struck the rear of the respondents' motor vehicle.

The respondents retained the services of a solicitor in Calgary within days of the collision. Correspondence between the solicitor's office and the insurer of the appellant ensued, the insurer being provided with medical information with respect to the respondents who were being treated in Nova Scotia with respect to their injuries.

In January 1992, the respondents' solicitor advised them that no action had been commenced within the two year time limit specified by the Alberta **Limitation of Actions Act**, R.S.A. 1980, c. L-15. Section 51 of that **Act** provides in part:

> "51. Except as otherwise provided in this Part, an action for . . .
>
> (b) trespass to the person, assault, battery, wounding or other injury to the person, whether arising from an unlawful act or from negligence or from breach of a statutory duty,
>
> . . .
>
> may be commenced within 2 years after the cause of action arose, and not afterward."

The respondents subsequently retained counsel in Halifax who secured file material from their Calgary solicitor and then commenced this proceeding on May 28, 1992 in the Supreme Court, some four months after the expiration of the limitation period prescribed in s. 2(1)(f) of the Nova Scotia **Limitation of Actions Act**, R.S.N.S. 1989, c. 258 (the **Act**) which provides:

> "2 (1) The actions mentioned in this Section shall be commenced within and not after the times respectively mentioned in such Section, that is to say:
>
> . . .

> (f) actions for recovery of damages on account of injury to persons or damage to property occasioned by or arising out of the ownership, maintenance, operation or use of a motor vehicle, within two years after the cause of action arise."

The respondents, in due course, located the appellant who was living in California and caused personal service of the originating notice (action) to be effected on January 21, 1993 On March 15, 1993 counsel for the appellant filed a defence on his behalf pleading that the cause of action did not arise within two years before the proceedings were brought and hence was barred by reason of s. 2 of the **Act** and the Alberta **Limitation of Actions Act**.

The respondents applied to the judge in Chambers to set aside the defence of limitation pursuant to s. 3(2) of the **Act** which provides:

> " (2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree which
>
> > (a) the time limitation prejudices the plaintiff or any person whom he represents; and
> >
> > (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person."

The Chambers judge dealt with two issues on the application. The first was whether the Alberta **Limitation of Actions Act** was applicable, and secondly, if the **Act** governs, whether the defence of limitation should be disallowed pursuant to s. 3(2) thereof.

As to the first issue, the Chambers judge concluded that the Alberta **Limitation of Actions Act** was inapplicable to proceedings taken in Nova Scotia because it was of a procedural rather than substantive nature. As to the second issue, the Chambers judge concluded that it was equitable having regard to the factors specified in the **Act** to disallow the defence of limitation.

The appellant's appeal is limited to a challenge of the decision of the Chambers judge on the first ground. The appellant submits, and we agree, that this is a case where leave should be granted

because the issue raised is a pure issue of law rather than of the exercise of a discretion. The sole issue is whether the Alberta **Limitation of Actions Act** has any application to these proceedings.

In dealing with causes of action that arise in another jurisdiction, courts apply the substantive laws of the foreign jurisdiction. In matters of procedure, however, the laws of the forum are applied.

The traditional view is that, in general, limitation periods extinguish remedies rather than substantive rights, and thus limitations are usually considered to be a matter of procedure.

The appellant refers to recent authority and text writers which have suggested that a rethinking of this position is warranted. It is said that a defendant who has gained the benefit of a limitation period in a foreign jurisdiction has acquired a right. See **Clarke v. Naqvi** (1989), 99 N.B.R. (2d) 271. The appellants contend that to treat a foreign limitation law as procedural has two serious negative effects.

First, it is submitted that to maintain the traditional position deprives a defendant of the acquired right by encouraging forum shopping by the plaintiff. However, this argument is met by the availability to the defendant in suitable cases of the doctrine of **forum non conveniens**. See **Monahan et al v. Trahan et al** (1992), 117 N.S.R. (2d) 393 (N.S.S.C.); and **Boucher v. Donovan** (as yet unreported N.S.C.A., C.A. No. 02857).

Second, it is said that it would be unjust to deprive the defendant who has relied upon the applicability of the foreign limitation provision of the immunities thereby provided. However, the provisions in the Nova Scotia **Statute of Limitations** permitting an extension of the time require the Court to have regard to the degree to which the extension would prejudice the defendant. The Chambers judge in this instance took or was able to take all relevant matters into account in reaching his decision to extend the period. No challenge has been made to his conclusion in this respect.

Although limitation statutes usually bar the remedy rather than extinguish the right, the latter type of provision is found. Indeed, s. 44 of the Alberta **Limitation of Actions Act** provides:

> "44. At the determination of the period limited by this Act to any person for taking proceedings to recover any land, rent charge or money charged on land the right and

> title of that person to the land, or rent charge or the recovery of the money out of the land is extinguished."

The section of the Alberta limitation period relied on by the appellant is expressed in the manner which courts have almost invariably considered apt to bar not the right but the remedy. See **Williams v. Canadian National Railway Company** 18 N.S.R. (2d) 229, especially at 243; **Benedict and Benedict v. Antuofermo** (1975), 19 N.S.R. (2d) 262.

We recognize that the New Brunswick Court of Appeal, with a dissent, took a different view in **Naqvi, supra**. We are also mindful of the decision of the Supreme Court of Canada in **Perrie v. Martin** (1986), 64 N.R. 195. While the majority of the New Brunswick Court of Appeal in **Naqvi** relied on the reasoning in **Perry** to support the conclusion that the foreign limitation period before it was substantive and not procedural, we prefer the reasoning on this point in the dissenting opinion of Ryan, J.A. See 99 N.B.R.
(2d) 294 - 296. The Supreme Court of Canada in **Perry** was, in our view, addressing its mind to whether an amendment to a limitation statute had a retrospective or prospective effect. Relevant to that issue was the **Interpretation Act**, R.S.O. 1970, the question whether the defendant had under the repealed limitation legislation acquired a right, and whether the amending legislation should be construed as interfering with that right. The Court did not resolve the issue by resorting to the technique of classifying the limitation legislation as substantive rather than as procedural See the decision of Chouinard, J. 64 N.R. 201 - 208.

We therefore choose to follow the traditional approach and find that the chambers judge was correct in holding that the Alberta **Limitation Act** was inapplicable, being a matter of procedure.

Leave to appeal is granted but the appeal is dismissed with costs which are fixed at $500.00. The disposition of the chamber's judge respecting costs before him stands.

Chipman, J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.